Jotun Powder Coatings (M) Sdn Bhd v Putrajaya Bumi Sdn Bhd

HIGH COURT (SHAH ALAM) — COMPANIES WINDING UP NO MT1–28–198 OF 2002
SURIYADI J
31 MAY 2003

Companies and Corporations — *Winding up — Advertisement of petition — Hearing of winding up petition postponed — Whether re-advertisement of the petition prior to the hearing or a dispensation of its compliance required — Companies (Winding Up) Rules 1972 r 24*

The petitioner had filed a winding up action against the respondent at the High Court, founded on a judgment debt. On 19 December 2002, the petition was advertised in the government gazette and two other vernacular newspapers. The winding up application was initially set down for hearing on 24 February 2003, but for some reason it was postponed to 16 April 2003. On the day of hearing of the winding up petition, the respondent raised a preliminary objection to the effect that there was no observance of r 24 of the Companies (Winding Up) Rules 1972 ('the Rules'), which allegedly required the re-advertisement of the petition prior to the hearing, or a dispensation of its compliance after the matter had been postponed. Another objection raised by the respondent was that the demand was made pursuant to s 218(2)(a) of the Companies Act 1965 ('the Act') only, which section could not stand on its own as a starting off point in a winding up action, but must be read together with s 218(1)(e).

Held, overruling the respondent's preliminary objections and allowing the winding up application:

(1) The words 'the hearing' in r 24 of the Rules must mean the very day the petition was actually disposed of, and not any return date or any date prior to its disposal. Therefore, the advertisement must have taken place seven clear days earlier or such longer time as the court had directed, before the actual disposal day of the petition. In the instant case, the mandatory advertising had taken place at a much longer period than statutorily required (see p 219F).

(2) On the scheduled day of hearing, all parties were expected to be present, wherein they would be informed of the next course of action. If the papers were in order, and the respondent was absent, it was the norm to pronounce a winding up order. If there was opposition to the application, but a hearing cannot be commenced immediately, prompting its postponement, parties would invariably be supplied with a new hearing date. On that score, logic would militate against re-advertising the petition, as not only would that expectation be expensive, unnecessary,

humiliating to the respondent but also time consuming. No further purpose was served to anyone if the matter was re-advertised let alone to be constantly advertised with every postponement. As for the alternative requirement of dispensation of re-advertisement in the event a new hearing date was given by the relevant court, there was no provision to that effect. A literal reading of r 24 of the Rules showed that, as long as it had been complied with, the petitioner was safe, irrespective of the number of postponements (see pp 220F–221A); *Oriental Enterprise Sdn Bhd v Sri Hartamas Contractors Sdn Bhd (in liquidation)* [2002] 4 AMR 3843 followed; *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd* [2002] 4 MLJ 390 and *Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd* [2003] 1 MLJ 417 distinguished.

(3) In respect of winding up petition that had been deliberately postponed sine die, or postponed for a specific period but eventually forgotten by parties ('stale winding up petition') and where the petitioner was genuinely interested to re-continue, a dispensation of re-advertisement or a re-advertisement perhaps could be the answer, conditional on there being no legal impediment at hand. As to what qualified as a stale winding up petition or otherwise, would depend on the facts of the case (see p 221C–E).

(4) Here, there was no necessity for the petition to be re-advertised or for a dispensation of re-advertisement because this case was fresh and the initial advertisement had achieved its purpose (see p 221E, G).

(5) Section 218(2)(a) of the Act was the source of the statutory demand. That demand, without the necessity of providing detailed reasons, was merely to warn the company of an impending winding up action in the event of its non-compliance. Since the documentary demand had no prescribed format or special form of words, the substance of the demand and not the form should be given undue attention. In the instant case, the court was satisfied that the demand was clear and to the point and there was no reason for the court to set the same aside (see pp 222F, 223D–E, I–224A).

(6) The format of the affidavit provided for under r 26 of the Rules was not per se mandatory but merely directory. Here, the non-compliance had not substantially changed the effect of the words or purport and in the process had not prejudiced the interest of the respondent in any substantial way (see p 224C, E).

(7) Since no payment had been made by the respondent, the only conclusion to be arrived at was that the respondent indeed was unable to pay its debt (see p 224G).

[Bahasa Malaysia summary

Pempetisyen telah memfailkan satu tindakan penggulungan terhadap responden di Mahkamah Tinggi, berdasarkan satu penghakiman hutang. Pada 19 Disember 2002, petisyen tersebut telah diiklankan dalam warta kerajaan dan dua akhbar vernakular yang lain. Permohonan penggulungan tersebut pada mulanya telah ditetapkan untuk didengar pada 24 Februari 2003, tetapi oleh suatu sebab ia telah ditangguhkan kepada 16 April 2003. Pada hari perbicaraan petisyen penggulungan tersebut, responden telah menimbulkan satu bantahan awal untuk menyatakan tiada pematuhan terhadap k 24 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah tersebut'), yang dikatakan menghendaki pengiklanan semula petisyen tersebut sebelum perbicaraan, atau satu pelaksanaan pematuhannya selepas perkara tersebut ditangguhkan. Satu lagi bantahan yang ditimbulkan oleh responden adalah di mana tuntutan tersebut telah dibuat menurut s 218(2)(a) Akta Syarikat 1965 ('Akta tersebut') sahaja, di mana seksyen tersebut bukan satu-satunya seksyen untuk memulakan satu tindakan penggulungan, tetapi perlu dibaca bersama dengan s 218(1)(e).

Diputuskan, menolak bantahan-bantahan awal responden dan membenarkan permohonan penggulungan tersebut:

(1) Perkataan-perkataan 'the hearing' dalam k 24 Kaedah-Kaedah tersebut bermaksud pada hari yang sama petisyen tersebut sebenarnya dilupuskan, dan bukan pada tarikh pulangan atau mana-mana tarikh sebelum ia dilupuskan. Oleh itu, iklan tersebut haruslah berlaku tujuh hari lapang lebih awal atau tempoh lebih lama lagi sebagaimana yang diarahkan oleh mahkamah, sebelum hari pelupusan sebenar petisyen tersebut. Dalam kes semasa, pengiklanan mandatori tersebut telah berlaku untuk tempoh yang lebih lama daripada yang dikehendaki oleh statut (lihat ms 219F).

(2) Pada hari perbicaraan dijadualkan, semua pihak diminta hadir, di mana mereka akan dimaklumkan tentang tindakan seterusnya. Jika kertas-kertas tersusun, dan responden tidak hadir, ia adalah kebiasaan untuk mengisytiharkan satu perintah penggulungan. Jika terdapat bantahan terhadap permohonan tersebut, tetapi satu perbicaraan tidak boleh dimulakan dengan segera, menyebabkan ia ditangguh, pihak-pihak setiap kali diberikan satu tarikh perbicaraan baru. Berdasarkan ini, logik akan menghalang pengiklanan semula petisyen tersebut, kerana ia bukan hanya akan dijangka mahal, tidak diperlukan, mengaibkan responden tetapi juga mengambil masa yang panjang. Tiada tujuan selanjutnya telah disampaikan kepada sesiapa jika perkara tersebut diiklankan semula dan jika ia diiklankan setiap kali berlaku penangguhan. Mengenai keperluan alternatif untuk

pelaksanaan pengiklanan semula sekiranya satu tarikh perbicaraan baru diberikan oleh mahkamah yang berkaitan, tidak terdapat peruntukan berhubungnya. Melalui bacaan secara harfiah k 24 Kaedah-Kaedah tersebut menunjukkan bahawa, selagi ia dipatuhi, pempetisyen adalah selamat, tidak kira berapa jumlah penangguhanpun (lihat ms 220F–221A); *Oriental Enterprise Sdn Bhd v Sri Hartamas Contractors Sdn Bhd (in liquidation)* [2002] 4 AMR 3843 diikut; *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd* [2002] 4 MLJ 390 dan *Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd* [2003] 1 MLJ 417 dibeza.

(3) Berhubung petisyen penggulungan yang dengan sengaja ditangguhkan sine die, atau ditangguhkan untuk satu tempoh yang ditetapkan tetapi kemudiannya telah dilupakan oleh pihak-pihak ('petisyen penggulungan yang lapuk') dan di mana petisyen betul-betul berhasrat untuk meneruskan semula, satu pelaksanaan pengiklanan semula atau satu pengiklanan semula mungkin jawapannya, dengan syarat tiada apa-apa yang menjadi penghalang. Setakat mana yang layak dikatakan satu petisyen penggulungan yang lapuk, akan bergantung kepada fakta-fakta kes (lihat ms 221C–E).

(4) Di sini, tiada keperluan untuk petisyen tersebut diiklankan semula atau untuk satu pelaksanaan pengiklanan semula kerana kes ini adalah baru dan iklan pertamanya telah capai tujuannya (lihat ms 221E, G).

(5) Seksyen 218(2)(a) Akta tersebut adalah sumber tuntutan statutori. Tuntutan tersebut, tanpa perlunya memberikan sebab-sebab terperinci, hanyalah untuk memberi amaran kepada syarikat tersebut terhadap satu tindakan penggulungan yang akan berlaku sekiranya berlaku ketidakpatuhannya. Memandangkan tuntutan dokumentarnya tidak mempunyai format yang ditetapkan atau bentuk perkataan-perkataan yang khas, isi tuntutan tersebut dan bukan bentuk perlu diberikan perhatian yang sewajarnya. Dalam kes semasa, mahkamah berpuas hati bahawa tuntutan tersebut adalah jelas dan nyata dan tiada sebab untuk mahkamah mengenepikan yang sama (lihat ms 222F, 223D–E, I–224A).

(6) Format afidavit yang diperuntukkan di bawah k 26 Kaedah-Kaedah tersebut bukan per se mandatori tetapi hanya satu arahan. Di sini, ketidakpatuhan tidak secara substantif menukar kesan perkataan-perkataan atau maksud dan dalam proses tidak memprejudiskan kepentingan respondent dalam apa cara yang substantif (lihat ms 224C, E).

(7) Memandangkan tiada bayaran telah dibuat oleh responden, satu-satunya kesimpulan yang ada adalah bahawa responden memang tidak boleh membayar hutangnya (lihat ms 224G).]

A **Notes**

For cases on advertisement of petitions, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 760–761.

Cases referred to

B *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd* [2002] 4 MLJ 390 (distd)

Cymun Development Sdn Bhd lwn Supermax Sdn Bhd [1995] 2 MLJ 233 (refd)

Dynasty Rangers Sdn Bhd & Anor v Perak Meat Industries Sdn Bhd [2002] 5 MLJ 291 (refd)

C *Eastool Industries Sdn Bhd v Getfirms Electronics (M) Sdn Bhd* [2001] 2 MLJ 641 (refd)

Emporium Jaya (Bentong) Sdn Bhd (in liquidation) v Emporium Jaya (Jerantut) Sdn Bhd [2002] 1 MLJ 182 (refd)

Hong Kong and Shanghai Banking Corp Ltd v Kemajuan Bersatu

D *Enterprise Sdn Bhd* [1992] 2 MLJ 370 (refd)

Imbangan Utama Sdn Bhd v Lotan Engineering Sdn Bhd [2002] 2 MLJ 313 (refd)

Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd [1990] 2 MLJ 46 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

E *Oriental Enterprise Sdn Bhd v Sri Hartamas Contractors Sdn Bhd (in liquidation)* [2002] 4 AMR 384 (folld)

Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd [2003] 1 MLJ 417 (distd)

Si & Si Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509 (refd)

F *Signland Ltd, Re* [1982] 2 All ER 609 (refd)

Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313 (refd)

Teck Yow Brothers Hand-Bag Trading Company v Maharani Supermarket Sdn Bhd [1989] 1 MLJ 101 (refd)

United Malayan Banking Corp Bhd v Richland Trade & Development

G *Sdn Bhd* [2000] 4 MLJ 670 (refd)

Legislation referred to

Companies Act 1965 ss 218(1)(e), (2)(a)

Companies (Winding Up) Rules 1972 rr 24, 194(1), Form 7

H

SN Tan (*KY Soo*) for the petitioner.

R Vasanthi (*AM Kanda & Assoc*) for the respondent.

Suriyadi J: The petitioner had filed a winding up action against the respondent at the High Court, founded on a debt amounting to

I RM147,481.37 up to 30 July 2002 inclusive of interest, at the rate of 8% per year from the date of a decision of the sessions court until full payment. That subordinate court's decision was meted out on 17 April 2002. The

petitioner filed this current action on 19 September 2002 after the respondent had ignored a demand served on him on 30 July 2002. A

Come the hearing day of the winding up petition on 16 April 2003, the respondent had raised a few preliminary objections as laid down in encl 12, inter alia, the non-observance of r 24 Companies (Winding Up) Rules 1972, which allegedly required the re-advertisement of the action prior to the hearing, or a dispensation of its compliance after the matter had been postponed. The latter provision reads: B

> Every petition shall be advertised in Form 4 seven clear days or such longer time as the court may direct before the hearing, as follows:
>
> 1 once in the gazette and twice at least in two local newspaper circulating in Malaysia or in such other newspaper as the court may direct. C

To appreciate what happened in this case, it would be quite instructive if I were to sketch out the events prior to the hearing of this petition on 16 April 2003. Initially, the winding up application was set down for hearing on 24 February 2003, but for some reason it was postponed to 16 April 2003. Notices informing all the relevant parties of the new date were issued vide letters dated 28 January 2003 (exhs E1–2, encl 12). D

The applicant in compliance with the requirements of r 24, but before the receipt of the notification informing of that postponement from the High Court, had already advertised in the government gazette on 19 December 2002 and two other vernacular newspapers, namely *The New Straits Times* and *The Malay Mail*. It had advertised in those same newspapers twice, respectively on 19 and 20 December 2002. As said above, what the applicant did not do was to re-advertise the matter on receipt of the postponement letter, or to seek out dispensation of the requirements of the relevant rule from the court. E F

In support of its objection, the respondent had referred to two cases, namely *Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd* [2003] 1 MLJ 417 and *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd* [2002] 4 MLJ 390, In both cases, the presiding judges had had the opportunity to discuss the requirements of r 24, whereupon they had opined that advertising was required once in the government gazette and twice at different dates in different newspapers prior to the hearing date, Their Lordships had remarked that the requirements of r 24 were mandatory, failure of which would result in the winding up petitions being struck out. G

I have no quarrels with their Lordships' legal interpretations as they were consonant with the statutory requirements, and were mere reiterations of the written low. Whether the eventual ratio decidendi of those cases should necessarily be followed by the current case, must depend on its factual matrix, and that of the above two. Needless to say, if the facts were worlds apart surely it follows to reason that the outcome of those cases would not necessarily be similar to the current one. In *Petro-Pipe Industries (M) Sdn Bhd*, the petitioner had merely advertised once each in separate newspapers, thus failing to observe the minimum second advertisement, H I

whilst in *Azman & Tay Associates Sdn Bhd*, the respondent had applied in court for an injunction that no advertisement be permitted. With those obvious shortcomings, what other decisions could those relevant courts have arrived at except to disallow the petitions. It was thus quite obvious that the background facts of those cases were in total variance with the current one, which had fully complied with the impugned rule.

So, was there a need to re-advertise under r 24 after the case had been postponed? To answer that poser I had to resolve first the meaning of 'the hearing' in the latter provision. It must be appreciated that the order of winding up is a draconian remedy, and thus as a general rule, a petition should be heard as expeditiously as possible, as the mere mention of a company being threatened by the hammer may paralyze the company (see *Company Law* by Walter Woon; *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509). Shanthy Rachagan, Janine Pascoe, and Anil Joshi in '*Principles of Company Law in Malaysia*' also had occasion to succinctly author at p 669:

> Applicants must advertise that they have filed an application and also notify the registrar of this. Accordingly, the fact that a winding up application has been filed becomes public knowledge before the court makes its decision. Winding up has serious consequences for the company, its members and creditors. These consequences are discussed below. The mere filing of an application can cause irreparable damage to the company, For example, a company may be refused credit, which could cause a liquidity crisis ... .

Perhaps founded on those reasons, rather stringent and mandatory conditions have been imposed by Parliament, and effectively put into effect by the courts of this country, before such a drastic remedy is sought and granted. With such a background, and invoking the tenets of construction, I had held the view that the words 'the hearing' in r 24 must 'mean the very day the petition is actually disposed off', and not any return date or any date prior to its disposal. In other words, the advertisement must have taken place seven clear days earlier or such longer time as the court had directed, before the actual disposal day of the petition. In this case, it was crystal clear that the mandatory advertising had taken place three months and twenty-seven days earlier, a much longer period than statutorily required, a natural outcome of the impugned postponement.

On this matter of the necessity of re-advertisement, the court in *Oriental Enterprise Sdn Bhd v Sri Hartamas Contractors Sdn Bhd (in liquidation)* [2002] 4 AMR 3843, had occasion to hold that such a requirement could be dispensed with. It had remarked:

> There is no requirement in the rule that the petition must be re-advertised whenever the hearing is postponed by the court to a future date, The advertisement serves the primary purpose of notifying the world at large that a petition for winding up of the company has been filed and the secondary purpose of notifying that a date had been set for the hearing of the petition.

I am partially in agreement with the above view, as to begin with, the most common reason for the presentation of a petition of winding up is due to the

inability of the company to settle its debts. Parliament in its wisdom, either to protect any applicant, creditors, the world at large, even perhaps the respondent, have found it necessary to step in into the messy business world, What better way to transmit the message that a particular company is shaky, and in the process alerting everyone, especially the unsuspecting ones if not by advertisements? A perusal of the format of the advertisement reads:

> NOTICE IS HEREBY GIVEN that a petition for the winding-up of the above-named company by the High Court was, on the ..... day of ..... 19..... presented by (*name of petitioner*)
>
> AND that the said Petition is directed to be heard before the court sitting at (state location) at ..... (am or pm), on the ..... day of ..... 19.....
>
> AND any creditor or contributory of the company, desiring to support or oppose the making of an order on the said petition, may appear at the time of hearing by himself or his counsel for that purpose. A copy of the petition will be furnished to any creditor or contributory of the company requiring the same by the undersigned or payment of the regulated charge for the same.
>
> The petitioner's address is (*address*)
>
> (The petitioner's solicitors are M/s (name) of (*address*).
>
> (Signature)
> (Solicitor for the) petitioner

Gauging the above format, among others, the world at large is informed of the winding-up petition against a named company, the petitioner's name and its address, the petitioner's solicitor's address, the time and date of hearing of the petition, the location of the High Court hearing it, and the opportunity given to any creditor or contributory of the company desiring to support or oppose the making of an order on the said petition, to come forward at the time of hearing, with a promise to furnish it with the relevant documents. In other words, whenever there is full compliance of the impugned r 24, the above is the comprehensive result.

One must bear in mind that at the scheduled day of hearing, all parties are expected to be present, wherein they will be informed of the next course of action, eg the matter be tried forthwith or postponed for some reason or other, If papers are in order, and the respondent is absent it is the norm that the winding up order is pronounced. If there is opposition to the application, but a hearing cannot be commenced immediately, prompting its postponement, parties are invariably supplied with a new hearing date. Even if the court has pre-empted the matter by postponing the matter by letter, with the hearing date regretfully being vacated, parties will invariably also be informed of the new date. On that score, all logic will militate against re-advertising, as not only will that expectation be expensive, unnecessary, humiliating to the respondent but also time consuming, In a gist, no further purpose is served to anyone if the matter is re-advertised let alone to be constantly advertised with every postponement.

On the issue of the alternative requirement of dispensation of re-advertisement, in the event a new hearing date is given by the relevant court, regretfully I was also unable to locate any provision to that effect. A literal

reading of the impugned rule shows that, as long as it has been complied with, the petitioner is safe, irrespective of the number of postponements. In *Oriental Enterprise Sdn Bhd*, the court also had occasion to comment:

> *It would not therefore be necessary to re-advertise the petition should for some reason or other, it is not heard on the day it was first scheduled to be heard. Neither would it be necessary to seek the dispensation of the court to re-advertise under r 24* (Emphasis added.)

Despite that literal interpretation, and as I had indicated I was only partially in agreement with the view of the court in *Oriental Enterprise Sdn Bhd* some consideration must be given to stale cases. It is a universal fact that there are untold number of cases that have been deliberately postponed sine die, or postponed for a specific period but eventually forgotten by parties. Some may have been settled but still at large, whilst some are just left lying around to be revived as potential intimidating remedies by the applicants. Needless to say, once the court's attention has been brought to the stale petition, the court may order it to be struck out for want of prosecution. In a scenario where the applicant is genuinely interested to re-continue, despite much water having flowed under the bridge, a dispensation or a re-advertisement perhaps could be the answer, conditional on there being no legal impediment at hand.

To regurgitate, in fresh cases where no prejudice or injustice will befall anyone, and with there being no legal requirement to do so, the necessity of dispensation or re-advertisement admittedly will benefit no one; whilst in a stale winding-up petition rejuvenated by an interested party, surely the necessity arises. What qualifies as *stale or fresh* will have to be left to the ingenuity of the court, dependent upon the facts before it.

Needless to say, in fresh cases once the provision of r 24 has been complied with fully, the responsibility falls squarely on all the interested parties to keep track of the matter, especially the new hearing date. A perusal of encl 12 of the current case, which qualifies as a fresh case, revealed that the court vide a notice dated 28 January 2003 had adequately informed the respondent of the new date. Factually, it was also not denied that the respondent had received that notice, and likewise had verbally admitted in open court of that knowledge (exhs E-1 and E-3, encl 12). With all the preconditions having been fulfilled, namely that this case was fresh, the initial advertisement having achieved its purpose, and there being no rationality to re-advertise, I therefore concluded that no repeat of the process was required. The dispensation requirement was certainly out.

To offer some brief guidelines for legal practitioners, in order to avoid pitfalls, some of these pertinent questions or steps may be considered when the necessity arises, namely:

(1) has r 24 been complied with? If the answer is in the negative, then the petition cannot be heard and failure is certain. Postponement may be sought, with its compliance in mind, when so applying;

(2) if r 24 has been complied with, then the winding up order may be sought. Success will depend on the strength of the case;

(3) if r 24 has been complied with but postponements have taken place, and the case being fresh with no re-advertisement or dispensation exercise having been undertaken, a winding up order may be applied for,

(4) if r 24 has been complied with but the case is stale, and the action of the applicant is not bona fide, the respondent may apply to have it strike out for want of prosecution. The court on its own volition may likewise strike it out; and

(5) if r 24 has been complied with, and despite it being stale but the court being satisfied that the applicant is bona fide in his action, and there being no legal bar around, instead of having the petition struck out, may concede to its revival, conditional on its re-advertisement, dispensation may not be appropriate in such a scenario.

The next objection that I had to deal with pertained the demand, whereat the respondent had alleged that there was failure to comply with certain legal requirements. According to the latter, the demand was pursuant to that of s 218(2)(a) of the Companies Act 1965, a section that could not stand on its own as a starting off point in a winding up action, and must be read together with s 218(1)(e). The question to be resolved before me therefore was whether s 218(2)(a) by itself, could be adverted to by a petitioner, when serving a statutory demand to enable a court to grant the winding-up order.

A statutory demand suffering bad service, which must inevitably include sending one that is defective, certainly is no service at all, and any advertising done pursuant to r 24, founded on that bad service certainly cannot salvage the defect. Invariably that petition will be struck out for want of a legally acceptable platform (see *Re Signland Ltd* [1982] 2 All ER 609).

A prognosis of the law inevitably points to s 218(2)(a) as the source of the statutory demand, which, inter alia, requires, that it be under the hand of the applicant or his authorized agent. That demand, without the necessity of providing detailed reasons, is merely to warn the company of the repercussion ie of an impending winding up action in the event of its non-compliance (see *Cymun Development Sdn Bhd lwn Supermax Sdn Bhd*[1995] 2 MLJ 233; *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313). To traverse slightly, sub-s (a) of s 218(2) mentions of 'a demand' rather than 'notice', ' demand notice' or the like. Regardless of its apparent lack of physical attributes', the ability to leave behind his signature (reflected by the words 'under his hand') or of his authorized agent ('under the hand of'), and Hollywood stuff aside, must surely mean that that demand cannot be parol in nature but has to be documentary. Shaik Daud JCA in *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* [2000] 4 MLJ 670 at p 675 had likewise asserted:

> In order for the demand to be effective, however, it must comply strictly with certain requirements as stipulated in the sub-section itself. The requirements are that the demand must be in writing under the hand of the creditor or his authorized agent .....

To emphasize the purpose, and to avoid its defeat the demand document should make mention of s 218(2)(a). In *Hong Kong and Shanghai Banking Corp Ltd v Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370, the court had viewed at p 378:

> In my judgment, s 218(2)(a) has to be read as having two limbs, the first of which prescribes what the creditor has to do to invoke the presumption. What the creditor has to do is to serve on the company by leaving at its registered office a demand under his hand or under the hand of his authorized agent requiring the company to pay the sum then due. The second limb prescribes that the debtor company has three weeks within which to pay the sum or to secure or compound for it. Since what the debtor company can do is statutorily prescribed, there is no call for the creditor to spell out what the law prescribes. *It is sufficient that it is clear from the contents of the letter of demand that it is a s 218(2)(a) notice which clarity can be achieved, inter alia, by a reference in the letter to the subsection* and by the letter giving three weeks to meet the demand. The effect of the debtor company not complying with one or the other of the three courses open to it as prescribed by the second limb of the sub-section need not be spelled out in the letter. (Emphasis added.)

The fact that the documentary demand has no prescribed format or special form of words, merely betrays the deliberate desire by Parliament to bestow a wide discretion on the court to do justice, according to the circumstances of the case. A rigid format needless to say will indicate the negativing of any discretionary interference on the part of the court. Without any prescribed format legislated, any court will have to bear in mind that substance and not form that must be given undue attention, in this case the inability of the respondent to pay the debt being the main cause of the whole exercise. Despite the above view on the format of the notice of demand, compliance with the substantive requirements of s 218(2)(a) is still mandatory.

To return to the mainstream of the poser, on whether s 218(2)(a) can stand on its own as the basis of the documentary demand, the method of analogy had to be adverted to by me, hence the necessity of referring to case laws. Suffice if I merely make mention of two cases. The court in *Teck Yow Brothers Hand-Bag Trading Company v Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101 in support of my view, had occasion to opine at p 103:

> I am of the view that s 218(2)(a), (b) and (c) are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound up by the court on any grounds of (a), (b) or (c).

Likewise, in *Weng Wah Construction Co Sdn Bhd v Yik Foong Trading Development Sdn Bhd* [1994] 2 MLJ 266, the court had remarked at p 271:

> ...before a demand under s 218(a) of the New Zealand Companies Act 1965 (hereinafter 'the NZ Act'), which is similar to our s 218(2)(a), can be relied upon as a foundation of a winding-up petition, it must be established that the demand has been served on terms of the specific and special requirements of the said section.

Needless to say, any court will not hesitate to set aside any irregular demand that can prejudice the interest of the respondent, but having scrutinized the impugned documentary demand, I was satisfied that it was crystal clear and

to the point. There was absolutely no reason for me to set it aside (see *Dynasty Rangers Sdn Bhd & Anor v Perak Meat Industries Sdn Bhd* [2002] 5 MLJ 291; *Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd* [1990] 2 MLJ 46). A

There were some other minor objections posed in the course of the proceedings, in the like of the applicant's failure to adhere strictly to r 26 of the Companies (Winding Up) Rules 1972. The respondent had ventilated that r 26 bore mandatory marks, requiring the verification by affidavit of the impugned petition and complete adherence in the affidavit to the format prescribed in Form 7. As there were variations in paras 4(c)(ii) and (iii) of encl 12, the latter were thus articulated to be defective. B

Having perused the Companies (Winding Up) Rules 1972, I am of the view that the format of the affidavit provided for under r 26 is not per se mandatory but merely directory. Its slight non-compliance may be construed as an irregularity, with no winding up proceeding to be invalidated by any minor variation (see r 194(1); *Emporium Jaya (Bentong) Sdn Bhd (in liquidation) v Emporium Jaya (Jerantut) Sdn Bhd* [2002] 1 MLJ 182; *Imbangan Utama Sdn Bhd v Lotan Engineering Sdn Bhd* [2002] 2 MLJ 313). For easy reference, r 194(1) is reproduced and it reads: C D

> No proceedings under the Act or the rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.

I certainly would have no compunction in rejecting any form that seriously detracts from the requirements of the law, let alone if the outcome were averse to a fair outcome, but certainly not if it were minor. Here, those infractions had not substantially changed the effect of the words or purport and in the process had not prejudiced the interest of the respondent in any substantial way. Even the defect in cl 2 of the affidavit affirmed by one Loh Lean Man on 20 September 2002 was a minor irregularity that did not cause any substantial injustice or prejudice to the respondent, hence the acceptance of the affidavit. E F

Evidentially as per encl 12, as I was satisfied that no payment had been made by the respondent, the only conclusion I could arrive at was that the respondent indeed was unable to pay its debt (see *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd*; *Eastool Industries Sdn Bhd v Getfirms Electronics (M) Sdn Bhd* [2001] 2 MLJ 641). G

With all the preliminary objections being unsuccessful, and with the applicant's petition in order, let alone there being no affidavit in reply, I had no problem in pronouncing order in terms to the winding up application (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). H

Respondent's preliminary objections overruled and winding up application allowed.

Reported by Lim Lee Na I